IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.305 OF 2006

M/s.Kinetic Engineering
Associates .. Petitioners

Versus

State of Maharashtra .. Respondent

Mr.G.S.Hegde with Lokesh i/b.Hegde and
Associates for petitioners
Mr.Vinay Sonpal, A.G.P.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 25th January 2006.

P.C.

. Heard Mr.Hegde for petitioner and

Mr.Sonpal, A.G.P. for respondents.

2. Respondent State filed a suit for recovery of a sum of Rs.4,26,532/- being R.C.Suit No.197/2001 in the Court of Joint Civil Judge, Senior Division, Kolhapur. It is not disputed that the said suit was decreed by the trial court on 30th May 2003. The decree is put in execution.

3. Petitioner original defendant in the suit filed an application under Order 9 Rule 13 of C.P.C. to set aside this ex parte decree and the said application has been dismissed as in the opinion of learned Judge, sufficient cause for moving the court after considerable delay has not been made out.

4. This petition under Article 227 is filed by petitioner to challenge an order on the Delay Condonation Application which was filed in the

Main Application under Order 9 Rule 13 of C.P.C.

5. Mr.Hegde for petitioner submits that the trial court was in error in refusing to condone the delay inasmuch as passing of the decree on 30th May 2003, is a fact, which was not known to the petitioner and it was averred specifically by him that it is only when he received a notice some time in July 2004 that he came to know that a decree was passed in the suit, ex parte. He has pointed out in the application that as far as taking steps after the knowledge is concerned, from the date of knowledge i.e. 9th July 2004 to 7th September 2004, petitioner took ill and was under treatment. He was advised complete bed rest. Other partners were not attending the matter. It is only the petitioner who had to prosecute the proceedings and on account of his illness, he could not do so. Mr.Sonpal, A.G.P. supports impugned order.

6. In my view, considering the averments in the application for setting aside the decree as also the delay condonation, this was a fit case where in a suit which is filed in the year 2001 and decreed in May 2003, an opportunity ought to have been given to petitioner to defend the same on merits. It is not as if the petitioner did not move in the matter. It may be true that the original writ of summons was served in time and the petitioner did not remain present. However, it is equally true that petitioner is a partnership firm and there are other partners. It is only that petitioner was concerned with the subject transaction and he has pointed out that why he could not take necessary steps during the pendency of the suit. Petitioner is a firm operating from Mumbai and the suit is filed in a court at Kolhapur. Learned Judge has while considering the application for condonation of delay has also considered the aspect that the writ of summons was served and the court was

justified in proceeding ex parte.

7. Taking a overall view of the matter and in the larger interest of justice, trial court would have been well advised in not only condoning the delay but giving an opportunity to the petitioner to defend the suit, of course by putting him to such terms as are permissible in law.

8. In the light of the fact that I have come to this conclusion, no useful purpose will be served by directing trial court to take up the application for setting aside ex parte decree and pass appropriate orders as that would postpone the adjudication. In the larger interest of justice, I put the petitioner to the following terms and on compliance therewith, ex parte decree passed on 30th May 2003 shall stand set aside and the suit would be restored to the file of trial court for disposal on merits and in

accordance with law. If the terms are complied with, suit shall be taken up and proceeded with in accordance with law. Needless to state that if the terms are not complied with them not only the delay condonation application but the main application for setting aside the decree to stand dismissed without any further reference to the court. Hence, following order:-

a) On petitioner's depositing by 27th February 2006 an amount of Rs.4,26,532/- in the Trial Court, the ex parte decree dated 30th May 2003 shall stand set aside.

b) Petitioner, thereupon, to file its written statement within four weeks from the date of such deposit and the trial court should take the same on record and proceed with the suit in accordance with law.

c) Petitioner to pay costs, quantified at Rs.5000/- of this petition as well as of proceedings in the trial court. The same to be paid within two weeks from today.

d) Till 27th February 2006, execution proceedings shall remain stayed. Needless to observe that if the amount is not paid within the time stipulated above, it would be open for respondent State to proceed and execute the decree passed on 30th May 2003. Respondent is at liberty to apply for withdrawal of the sum, if deposited, in the trial court.

(S.C.DHARMADHIKARI, J)